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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JESSE DELGADO, Defendant and Appellant.	B284957 (Los Angeles County Super. Ct. No. NA103717)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard M. Goul, Judge. Affirmed.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

Jesse Delgado, convicted of being a felon in possession of a firearm (Pen. Code,[1] § 29800, subd. (a)(1)), challenges his conviction and sentence on multiple grounds, including instructional error, prosecutorial misconduct, unconstitutional exercise of peremptory challenges, evidentiary error, insufficiency of the evidence, sentencing error, and the denial of the right to have the same jury consider the substantive offense and the prior conviction allegations. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Delgado was charged with possession of a firearm by a felon and assault with a firearm (§ 245, subd. (a)(2)). He was alleged to have suffered four prior strike convictions within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(j), 1170.12, subds. (a)-(d)), and to have served three prior prison terms pursuant to section 667.5, subdivision (b).

The victim of the offense, Anthony Vallecillo, testified that on November 23, 2015, he went to the apartment he had been sharing with his girlfriend Cynthia Nuno. Vallecillo and Nuno were separating, and Vallecillo was planning to pick up his belongings. Although Nuno was expecting him, she acted hesitant when he arrived and did not want to let him in the apartment. Nuno had prepared a box with some of Vallecillo's belongings, but he wanted a few additional items from the home. Vallecillo and Nuno argued for several minutes. Vallecillo then "nudged" his way between the door and Nuno, entering the apartment.

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[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

Nuno screamed at Vallecillo to get out as he gathered his possessions. Delgado came out into the hallway with a gun and pointed it at Vallecillo. Delgado told Vallecillo to leave. When Delgado pulled out the gun, Nuno jumped in front of him and pushed him into the bedroom. Vallecillo collected his things and left the apartment.

Vallecillo called the police to report the incident because he and Nuno had a son together, and he did not want Delgado around his son. The recording of Vallecillo's 911 call was played for the jury. Vallecillo told the dispatcher, "Somebody just put out a gun on me, and he's about to leave my girlfriend[']s house. I just went to go pick up my stuff." He identified Delgado as "Yogi." Vallecillo said that he was picking up his things, and "he just came out of a room[,] I guess . . . ."

Vallecillo testified that a few days after the incident, he, Nuno, and Delgado spoke on the telephone in a three-way call. The recorded call was played for the jury. In the telephone call, Delgado told Vallecillo "it wasn't too cool" that he handled the incident by filing a police report.

Vallecillo said, "Oh[,] yeah[,] that's not cool pulling a strap out on me[,] come on[,]dog."

Delgado told Vallecillo to relax. Vallecillo demanded, "You think it's cool that somebody pulled a strap out on you and you're going to be cool with it? Let me ask you that straight out man to man, man to man . . . exactly."

"Nah[,] I'm not going to be cool with it but I'll handle it like a man, I'm not going to fuckin' out and put a dime on nobody." Delgado responded.

Later in the conversation, Vallecillo said, "[A]s a man I go as fists[,] bro, I don't go as guns[,] I'm telling you that right now."

"Okay," said Delgado.

"You understand me? I don't come out pulling out straps[,] bro. . . . But to tell you the truth I didn't appreciate that, I'm letting you know that right now," Vallecillo told Delgado. Vallecillo said that Nuno could have avoided the entire issue if she had asked Delgado to stay in another room while Vallecillo gathered his belongings. He said he came to pick up his possessions, not to cause problems with anyone.

Delgado said, "I'm not trying to start no bullshit either, but as a man you know . . . there is communication—."

Vallecillo answered, "And you lack that . . . bro. [']Cause you came straight out with a strap[,] homie[,] at my face."

Later in the conversation, Vallecillo told Delgado, "[B]ringing out a strap in front of me[,] that wasn't cool."

"None of it was ever pointed[,] nothing like that to you[,] dog[,] or nothing like that[,] but it is what it is and whatever is done is done. What do you want to do about this now?" asked Delgado.

Vallecillo said that "if we are cool I'll drop this case and we'll let it be. I just don't want you around my son, that's the only thing I don't want."

Delgado, Vallecillo, and Nuno talked some more, and then Delgado returned to the incident in the apartment. "I'm not trying to intrude or anything, but you know, to me that was kinda fucked up that I did pull that out[,] but at the same time somebody is trying to rush in and I'm like[,] what the fuck[,] you know."

Defense counsel cross-examined Vallecillo extensively in support of the defense theory that Vallecillo, a jealous and violent ex-boyfriend, had fabricated this account and also made false

reports to the police about Delgado on two subsequent occasions. Vallecillo denied forcing his way into the apartment, but he admitted that he entered the apartment despite Nuno's request that he leave. Vallecillo acknowledged that on the same day as the incident, Nuno reported him to the police for domestic violence.

Defense counsel also questioned Vallecillo about two police reports he made on a single day a few weeks later in December 2015. The first report was made to the Long Beach Police Department, and the second to the Los Angeles Police Department. Vallecillo admitted that he was following Nuno when he reported to the Long Beach Police Department that a gun had been drawn on him. Defense counsel delved deeply into exactly what Vallecillo had reported to the police on each occasion, particularly whether he had identified Delgado to the police in these calls and whether he reported to the Los Angeles Police Department that the gun had been pointed at him just then or whether he said that the person in the car had pointed a gun at him in the past. Defense counsel also elicited testimony from Vallecillo that after his report to the Los Angeles Police Department, he was arrested for stalking and for filing a false police report.

Defense counsel also cross-examined Vallecillo about his relationship with Nuno. Text messages evincing the hostility between Nuno and Vallecillo, and their conflict over their son, were presented to the jury. Defense counsel inquired extensively into an incident of domestic violence by Vallecillo against Nuno in July, 2016. Vallecillo acknowledged a dispute over their son but denied being violent with Nuno or dragging her with his car.

Defense witness Nuno testified about the November 23 incident, stating that Vallecillo appeared unannounced at her apartment; shoved his way into the apartment; yelled at her; and shoved her against the wall, injuring her. The "whole gun incident" did not happen. Delgado was not in the apartment at the time.

Nuno testified that Vallecillo told her a few days later that he had reported Delgado to the police. Vallecillo threatened to "do whatever it took" to put Delgado in jail and to keep him away from Vallecillo and Nuno's son. Vallecillo had previously made false reports about Nuno, leading to social service agency involvement with their child. She feared losing her child and believed that Vallecillo had used their son to keep her in their relationship. Nuno was afraid of Vallecillo, who was "always" abusive to her. Vallecillo tried to convince her to retract her police report against him.

Nuno testified that during the three-way conversation played for the jury, Vallecillo and Delgado were not discussing the November 23 incident but a different occasion when Vallecillo went to Delgado's home.

With respect to the subsequent December 2015 police reports, Nuno denied that the any of the events Vallecillo had reported to the Long Beach Police Department happened. Vallecillo's report to the Los Angeles Police Department prompted the police to follow her in her car, stop her car, pull her from her vehicle, and arrest her. The police released her, telling her that they had arrested her because Vallecillo reported that she had pointed a gun at him. Vallecillo, who was standing by and watching, was arrested.

Nuno testified that in July, 2016, Vallecillo took their son without her permission and drove away while she was hanging on to the car door, injuring her and nearly dragging her along with the car. Vallecillo had threatened to take their son away from her if Delgado did not stay away.

Delgado presented the testimony of the Los Angeles Police Department officer who took Nuno's November 23, 2015, report of domestic violence. Nuno had reported that Vallecillo came to her home, grabbed her by the arms, and shoved her up against the wall. The officer photographed Nuno's bruises and a fresh abrasion on her elbow.

Delgado also examined police officers from the Los Angeles Police Department and the Long Beach Police Department concerning the two reports Vallecillo made in December, 2015, as well as the report of domestic violence Nuno made in July, 2016. Nuno's father testified about the 2016 incident and related that Vallecillo had said he would "do whatever was possible to make sure [Delgado] was locked up so in the future he wouldn't be anywhere with his son."

Delgado was convicted of being a felon in possession of a firearm. The jury was unable to reach a verdict on the assault with a firearm charge, and the court declared a mistrial. After a court trial at which the court found true the allegation that Delgado had suffered four prior strike convictions within the meaning of the Three Strikes law, the court sentenced Delgado to nine years in state prison, consisting of the upper term of three years, doubled,[2] plus three additional one-year terms for his three prior prison terms. Delgado appeals.

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[2] Section 1170.12, subdivision (c)(2)(C) provides that when a defendant has two or more prior strikes but the instant offense is

DISCUSSION

I. Jury Selection

Delgado, who is identified in the record as Mexican-American, contends that the prosecution improperly exercised its peremptory challenges to excuse three Hispanic prospective jurors in violation of *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

Defense counsel objected when the prosecution exercised a peremptory challenge to excuse Prospective Juror No. 1885, whom she identified as the only Mexican-American man on the panel of prospective jurors. She said, "Of course, there's no pattern yet, but I find he's a protected class." She predicted that the prosecution would challenge other Hispanic prospective jurors and said that she thought Prospective Juror No. 1885's answers to questions during voir dire had demonstrated attitudes favorable to the prosecution. Defense counsel stated, "[T]o tell the truth, if I were looking to the other Latino people that have been . . . excused and challenged for cause that we went through, it would probably show that [the prosecutor has] excused at least three of them." The court noted that the prosecutor had exercised eight peremptory challenges, and that two excused jurors were Hispanic women while one was a Hispanic man. The court said it saw no pattern in the prosecution's use of peremptory challenges. Neither female Hispanic prospective juror was identified by badge number or seat number.

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not a serious or violent felony (as defined in sections 667.5, subdivision (c) and 1192.7, subdivision (c)), the defendant shall be sentenced as though he or she has one prior strike (except under certain conditions not applicable here).

"'Both the state and federal Constitutions prohibit the use of peremptory strikes to remove prospective jurors on the basis of group bias. [Citations.]' [Citation.] 'When a defendant asserts at trial that the prosecution's use of peremptory strikes violates the federal Constitution, the following procedures and standards apply. "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citation.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.' [Citation.]" [Citations.] The identical three-step procedure applies when the challenge is brought under the California Constitution. [Citation.]' [Citation.]" (*People v. Jones* (2017) 7 Cal.App.5th 787, 801-802 (*Jones*).)

A prima facie case of racial discrimination in the use of peremptory challenges is established if the totality of the relevant facts gives rise to an inference of discriminatory purpose. (*People v. Thomas* (2012) 53 Cal.4th 771, 793.) "Among the 'types of evidence [that] may prove particularly relevant' in evaluating whether a prima facie case of discrimination exists 'are that a party has struck most or all of the members of the identified group from the venire, that a party has used a disproportionate number of strikes against the group, that the party has failed to engage these jurors in more than desultory voir dire, that the defendant is a member of the identified group, and that the victim is a member of the group to which the majority of the

remaining jurors belong. [Citation.] A court may also consider nondiscriminatory reasons for a peremptory challenge that are apparent from and "clearly established" in the record [citations] and that necessarily dispel any inference of bias. [Citations.]' [Citation.]" (*Jones*, *supra*, 7 Cal.App.5th at p. 802.) When a trial court denies a *Batson*/*Wheeler* motion because it finds no prima facie case of group bias was established, the reviewing court considers the entire record of voir dire. (*Ibid*.) If the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question, we affirm. (*Ibid*.)

"While it is true that '[t]he exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal' [Citation], the prima facie showing is not made merely by establishing that an excluded juror was a member of a cognizable group. [Citations.] Rather, "'in drawing an inference of discrimination from the fact one party has excused 'most or all' members of a cognizable group" . . . "a court finding a prima facie case is necessarily relying on an apparent pattern in the party's challenges." [Citation.] Such a pattern will be difficult to discern when the number of challenges is extremely small.' [Citations.]" (*Jones*, *supra*, 7 Cal.App.5th at p. 803.) "While no prospective juror may be struck on improper grounds, we have found it "'impossible,'" as a practical matter, to draw the requisite inference where only a few members of a cognizable group have been excused and no indelible pattern of discrimination appears." (*People v. Garcia* (2011) 52 Cal.4th 706, 747-748 [no prima facie case of discrimination where prosecutor excused three women].)

Standing alone, the prosecutor's use of three of eight peremptory challenges to excuse three Hispanic jurors was

insufficient to establish a prima facie case of race discrimination. (See, e.g., *Jones*, *supra*, 7 Cal.App.5th at pp. 803-804 [use of three of nine peremptory challenges to excuse African-American prospective jurors insufficient to establish a prima facie case of discrimination].) Defense counsel conceded, and the trial court found, that there was no pattern in the prosecution's peremptory challenges. As the record is silent as to which of the other excused prospective jurors were Hispanic, we are unable to review the voir dire of those jurors when considering whether the totality of the relevant facts gives rise to an inference of discriminatory purpose.

Delgado has not identified any additional information in the record to support the claim that the prosecutor's use of peremptory challenges was motivated by race. He argues that there were "no valid reasons to excuse" Prospective Juror No. 1885, but the record contradicts that assertion. Prospective Juror No. 1885 raised his hand when the prosecutor asked if any prospective jurors had "any strong feelings about not being able to follow the law in this case." He said having grown up in a family where there was domestic violence, drugs, and weapons, "it's hard for me to be in a case like this." It would be difficult for him "just being in a room where all this was discussed." Prospective Juror No. 1885 said that the voir dire questioning gave him flashbacks to his childhood. The prosecutor explained that her reference to drugs was as an example about the law and not evidence, and she said that jurors' experiences can be helpful because they give jurors different perspectives and assist in evaluating witness credibility. When the prosecutor asked how that made Prospective Juror No. 1885 feel, he responded, "I don't know. As the case goes on, I don't know how I would feel. It

would be different maybe." He said that he would be able to find someone guilty or not guilty based on the evidence, but when asked if he would be able to be fair, he responded, "I would try." Delgado has not demonstrated any error in the court's conclusion that he did not establish a prima facie case of discrimination in jury selection.

II. Evidentiary Issues

A. Denial of Motion to Recall Witness

Delgado sought to recall Vallecillo to the witness stand during the defense case. When asked for an offer of proof, Delgado's counsel said that she expected an officer from the Long Beach Police Department to testify that there had been no report in Long Beach of a person with a gun, and that then Vallecillo would be recalled to authenticate a recording of his December 2015 911 call to the Los Angeles Police Department in which he said that someone had drawn a gun on him in Long Beach. Delgado's attorney said that this evidence would conflict with Vallecillo's testimony that he had not told the Los Angeles Police Department that there was a gun. The trial court ruled that recalling Vallecillo was unnecessary to impeach his credibility on this point because inconsistencies in his accounts could be demonstrated by introducing the recording once authenticated by a witness from the Los Angeles Police Department. Moreover, the court noted, because the officer was expected to testify that Vallecillo said he had called the police because a man "had flashed" a gun at him, the recording would be cumulative. The court told Delgado, "I'm not going to have a side trial on this. You get your impeachment in. The officer contradicts what the People's witness said."

Delgado's counsel advocated for the recording to be played to demonstrate inconsistencies within the 911 call itself, as well as to present evidence of the Los Angeles Police Department's response to Vallecillo's false report. The court ruled that the police response was irrelevant, and that while the officer could be examined about what Vallecillo said for the purpose of impeachment, the remaining matters were excluded because they would consume an undue amount of court time. Defense counsel continued to argue about other inconsistencies regarding the later incident, and the court said, "Counsel—we're not going to allow a . . . 911 tape on this point at a different incident separate from the charges in this case. We're sticking to the trial of November 23, 2015. You've brought in other things to impeach the witness. You have done so. We're not going to go further into that. You can bring in [the police officer] because he's under subpoena to impeach the witness on the issue of the gun, but we're going to stop it there. Not cumulative mini trials on the whole thing." The court noted that Delgado had cross-examined Vallecillo for a full day.

When the trial resumed the next court day, Delgado again asked for Vallecillo to be recalled. The court asked, "What is the purpose because you had him on the stand for over four hours already?" Delgado's counsel repeated her argument that she wanted Vallecillo to authenticate the December 2015 911 call recording because "he told two different stories to the dispatcher," and she argued that the recording of Vallecillo's voice was the best evidence. The court denied Delgado's request under Evidence Code section 352, citing the limited probative value of the evidence and the undue consumption of court time involved in

exploring incidents other than those that formed the basis of the charge in the case.

That afternoon, Delgado's attorney again asked that Vallecillo be recalled, stating, "I would just like to be able to recall Mr. Anthony Vallecillo. I ask that he be placed—not be released. He makes out of his own mouth on these transcriptions [of the 911 call] several impeaching statements that I could not have impeached him with better out of his own mouth. We have the transcript and the tape available. He has denied all of them. And just because he has denied all of them, I don't feel that he has necessarily been successfully impeached; nor, did any of the witnesses—the police officers who testified from L.A.P.D. about the . . . December 12, 2015, incident—they had no knowledge of that. And I believe that with respect to his credibility, as this is a case of credibility, that it's very important that he should be impeached by his own statements because he directly denied ever having made them."

The court denied Delgado's request on the ground that the evidence was cumulative and subject to exclusion under Evidence Code section 352. The court said, "The L.A.P.D. officer who testified this afternoon as well as the Long Beach police officer who testified very specifically contradicted . . . Mr. Vallecillo's accounts specifically regarding the November [*sic*] 12, 2015, incident where on the stand here he said a third party pointed a gun. He had told the officer—he had never mentioned the third male pointing a gun. In fact, very specifically, according to the officer's testimony, he accused Mr. Delgado of pointing the gun. It's very clear that the officer[]s called by the defense today . . . have impeached . . . Mr. Vallecillo on several points. And I believe that the tapes [and] recalling him would be

cumulative at this point on the side matter. For this reason, the court is respectfully denying your motion."

On appeal, Delgado asserts that the trial court violated his rights to confront witnesses and to present a defense by denying his requests to recall Vallecillo. In his opening brief, he extensively describes Vallecillo's testimony and then provides three sentences of argument that are supported by citations to general principles of law. First, he states, "Given the inconsistencies in Vallecillo's testimony, his history of domestic abuse and false police reports, the trial court abused its discretion when it denied the defense motion to recall him." Next, he asserts that the error denied him his federal and state constitutional rights to confront adverse witnesses, to present a defense, and to a fair trial. Finally, he asserts, "Reversal is necessary because the error was not harmless beyond a reasonable doubt."

Delgado's brief, however, does not provide any legal argument in support of these conclusory assertions. He offers no analysis elaborating on why and how the court's rulings—that the inconsistent statement could be presented without recalling Vallecillo, that the other evidence was cumulative, and that the evidence of inconsistencies in reports relating to other incidents had limited probative value and would unduly consume court time—were erroneous and an abuse of discretion. We deem this issue to have been forfeited. (*People v. Gallardo* (2017) 18 Cal.App.5th 51, 69, fn. 11 (*Gallardo*).) Similarly, as he provides "no elaboration or separate argument for [his associated] constitutional claims," we need not address them. (*People v. Thompson* (2016) 1 Cal.5th 1043, 1116; see also *People v. Mills* (2010) 48 Cal.4th 158, 194.)

B. Recorded Telephone Call

Prior to trial, Delgado moved to exclude the recorded telephone call among Delgado, Vallecillo, and Nuno pursuant to section 632 because it was recorded without Delgado's knowledge, was unreliable, and lacked foundation as to the parties and the date of the call. The court concluded that the recording was admissible under the exception set forth in section 633.5, subject to a proper foundation being laid. On appeal, Delgado argues that the recording was inadmissible under section 632 and the federal wiretapping statutes (18 U.S.C. § 2510, et seq.). Delgado, who did not argue that the recording was inadmissible under federal law in the trial court, has forfeited that claim. (*People v. Partida* (2005) 37 Cal.4th 428, 431.) As to the state law argument, we review the court's evidentiary ruling for an abuse of discretion. (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1095.)

The trial court did not abuse its discretion in admitting the recording. "Section 632 makes it a criminal offense to use a device 'to eavesdrop upon or record' a 'confidential communication' without 'the consent of all parties' to the communication. (§ 632, subd. (a).) Except to prove a violation of section 632 itself, evidence obtained in violation of the section 'is not admissible in any judicial, administrative, legislative, or other proceeding.' (§ 632, subd. (d).) Section 633.5 provides an exception according to which one party to a confidential communication is permitted to record the communication secretly 'for the purpose of obtaining evidence reasonably believed to relate to the commission by any other party to the communication' of certain crimes, including 'any felony involving violence against the person.'" (*In re Trever P.* (2017) 14 Cal.App.5th 486, 490.) Here, the content of the recorded call

pertained to the charged offense of assault with a firearm. The trial court did not abuse its discretion in admitting the evidence.[3]

III. Instructional Issues

A. Unanimity Instruction

Delgado argues that his conviction must be reversed because the trial court failed to instruct the jury sua sponte with CALCRIM No. 3500 or 3501. According to Delgado, because Vallecillo claimed that Delgado had a gun on three different occasions, in the absence of a unanimity instruction the jury may not have unanimously agreed on one criminal act, or it may have convicted him based on an amalgamation of evidence.

In a criminal case, "the jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act." (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) "This requirement of unanimity as to the criminal act 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' [Citation.]" (*Ibid.*)

If there was any error in failing to give the unanimity instruction prior to the jury's initial deliberations, it was

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[3] The continued viability of the section 632 exclusionary rule is under review by the California Supreme Court in *People v. Guzman* (2017) 11 Cal.App.5th 184, review granted July 26, 2017, S242244. As we conclude that the evidence is admissible pursuant to section 633.5, we need not address this issue here.

harmless under any standard,[4] because the jury was expressly instructed that that its task was to determine whether Delgado possessed a firearm on November 23, 2015, the date of the charged offense. During deliberations, the jury asked, "Is the court asking if the defendant had a gun in his possession on the date of Nov. 23, 2015[,] or if he was in possession of a gun period?" The court, after consultation with the parties, responded, "Nov. 23, 2015." In light of the court's unequivocal instruction to the jury, we conclude beyond a reasonable doubt that all jurors must have unanimously agreed on the act constituting the offense.

B. Self-Defense and Defense of Others

Delgado argues that the court should have instructed the jury sua sponte on self-defense, the defense of others, and the use of force against an intruder. The trial court must instruct on general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case. (*People v. Brooks* (2017) 3 Cal.5th 1, 73.) This "duty to instruct extends to defenses 'if it appears . . . the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.' [Citations.]" (*Ibid.*)

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[4] The proper standard of review when the court has failed to give a unanimity instruction is not itself unanimously agreed upon (see, e.g., *People v. Hernandez* (2013) 217 Cal.App.4th 559, 576), but we need not resolve that issue. As any error was harmless under the more exacting standard of *Chapman v. California* (1967) 386 U.S. 18, any error was likewise harmless under the standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836.

Here, Delgado's defense was that Vallecillo fabricated the entire event. His attorney argued, "[W]hat was supposed to have happened did not happen. That didn't happen on November 23rd or any other day." She continued, "Mr. Delgado is not guilty of having a gun. He's not guilty of assaulting Mr. Vallecillo. In fact, the more reasonable explanation . . . [is that] he was not even there that day or any other day." Because instructing the jury on self-defense, defense of others, and the use of force against an intruder would have been inconsistent with Delgado's theory of the case, the court did not err by failing to instruct the jury on those principles.

C. Limiting Instruction

Because Vallecillo testified to more than one incident in which Delgado had a gun, Delgado contends that the court had a duty to instruct the jury sua sponte that the evidence that he possessed a gun on other dates could not be used to prove he committed the charged offense or to establish a criminal disposition. The trial court had no sua sponte duty to give a limiting instruction. (Evid. Code, § 355; *People v. Sanchez* (2016) 63 Cal.4th 411, 460.) The argument is not cognizable on appeal because Delgado did not request the court to limit the evidence in this way (*Sanchez*, at p. 460), and in fact he expressly rejected a limiting instruction at trial. The prosecutor asked the court to instruct the jury with CALCRIM No. 303, concerning limited purpose evidence, but the court declined to give the instruction because Delgado opposed it. Delgado cannot complain on appeal of the failure to give the limiting instruction.

IV. Sufficiency of the Evidence

Delgado contends the evidence was insufficient to support his conviction. "'"When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] We determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.] In so doing, a reviewing court "presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' [Citation.]" (*People v. Rangel* (2016) 62 Cal.4th 1192, 1212-1213.)

Section 29800, subdivision (a)(1) provides that it is a felony for a felon to have a firearm in his possession or under his control. Delgado stipulated to being a felon for purposes of this charge. Vallecillo testified that Delgado pointed a gun at him. In the recorded call, moreover, Delgado admitted that he had drawn a gun on Vallecillo, conceding that it "was kinda fucked up that I did pull that out." He did not dispute Vallecillo's accusation that he had drawn a gun—he only claimed he had not pointed it at Vallecillo. The evidence was sufficient to support the conviction.

Delgado presents two arguments that the evidence was insufficient to support the conviction. The first is one sentence long: "It was legal for appellant to be armed against an intruder under the doctrine of self-defense/defense of another/defense of home." "[T]o demonstrate error, an appellant must supply the

reviewing court with some cogent argument supported by legal analysis and citation to the record. . . . [W]e may disregard conclusory arguments that . . . fail to disclose the reasoning by which the appellant reached the conclusions he wants us to adopt." (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 286-287; Cal. Rules of Court, rules 8.360(a), 8.204(a)(1)(B); *Gallardo*, *supra*, 18 Cal.App.5th at p. 69, fn. 11.)

Delgado's other argument is that Vallecillo was not a credible witness. We neither reweigh the evidence nor reevaluate the credibility of witnesses. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

V. Prior Convictions and Sentencing Issues

A. Discharge of the Jury

At Delgado's request, the court ordered a bifurcated jury trial on the prior conviction allegations. However, once the jury rendered its verdict on count 1 and the court declared a mistrial on count 2, the court dismissed the jury without objection by the parties. The court then set a date for Delgado's sentencing hearing, at which point the prosecutor alerted the court that a trial on Delgado's prior conviction was required. The court, noting that Delgado had not waived his right to have a jury determine his prior convictions, said, "That means we need to pick another jury on the priors unless there is an admission of the priors." The court continued the matter to the following month for Delgado and his counsel to choose whether to have a court trial or a jury trial. When the court reconvened, Delgado, joined by his counsel, waived his right to a jury trial on his prior convictions, and the court subsequently conducted a court trial on his priors.

On appeal, Delgado argues that his statutory right to have the same jury decide the guilt and prior conviction allegations was violated. He forfeited this issue by failing to object in a timely fashion when the jury was discharged. (*People v. Saunders* (1993) 5 Cal.4th 580, 591.) Delgado, however, claims that his counsel's failure to object was due to ignorance of the law, and that counsel rendered constitutionally ineffective assistance when she did not object. To establish ineffective assistance of counsel, Delgado must demonstrate that " . . . '(1) counsel's representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation subjected the petitioner to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the petitioner.' [Citation.]" (*In re Jones* (1996) 13 Cal.4th 552, 561.)

The sole support Delgado offered in his opening brief for this contention was the claim that Delgado's counsel "stated on the record she did not know what happened if the jury was dismissed." As the Attorney General has pointed out, and as Delgado conceded in his reply brief, the prosecutor, not defense counsel, made that statement. Because the record does not demonstrate the absence of any rational tactical purpose for the failure to object to the discharge of the jury, Delgado's claim must be denied on direct appeal. (*People v. Ray* (1996) 13 Cal.4th 313, 349.)

B. Strikes

The trial court found that Delgado had suffered four prior felony convictions that qualified as strike offenses. On appeal, Delgado initially alleged that three of the four prior convictions

did not qualify as strikes, but in his reply brief he conceded that two of those three challenged convictions were in fact strike priors. As it is uncontested that at least three of his prior convictions constituted strikes, Delgado's sentence of the upper term of three years, doubled pursuant to the Three Strikes law, was properly calculated and imposed under that statutory scheme.

Delgado next asserts that the trial court abused its discretion when it declined to strike his prior strikes for the purposes of applying the Three Strikes law (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497), and to dismiss the one-year prior conviction enhancements under section 667.5, subdivision (b). He contends that the strikes and sentence enhancements should be dismissed in the interest of justice because "the nine-year sentence for protecting Nuno against an[] unwanted intruder was too severe, constituted an abuse of discretion, and was outside the spirit of the Three Strikes Law." We reject these claims.

"[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Delgado is a repeat offender whose prior and current felonies all involve firearms. He was convicted in 1998 of discharging a firearm in public (§ 246.3.) He was convicted in 1999 of assault with a firearm. In 2004 he was convicted of carrying a loaded firearm (former § 12031, subd. (a)) and being a felon in possession of a firearm (former § 12021, subd. (a)(1)), and these offenses were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). Since 1998, Delgado had not remained free of prison custody and the commission of a felony offense for a period of five years. The trial court observed that Delgado engaged in a pattern of violent conduct that posed a serious danger to society. The court declined to strike the one-year enhancements "based upon the long series of state prison commitments for serious and violent felonies involving firearms." Based on the present offense and his past offenses, his background, his character, and his prospects, we cannot say the court abused its discretion when it declined to strike Delgado's prior strikes or dismiss the one-year sentence enhancements in the interest of justice.

C. Cruel and Unusual Punishment

For a punishment to be cruel and unusual under the Eighth Amendment, it must be grossly disproportionate to the offender and offense. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001.) The California Constitution prohibits any sentence that is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted.) The California Supreme Court has instructed that, when reviewing a claim of cruel or unusual punishment, courts should examine the nature of the offense and offender, and compare the punishment

with the penalty for more serious crimes in the same jurisdiction and the same offense in different jurisdictions. (*People v. Dennis* (1998) 17 Cal.4th 468, 511; *Lynch*, at pp. 425-429.) Although Delgado alleges that his nine-year sentence for being a felon in possession of a firearm constitutes cruel and/or unusual punishment under the United States and California Constitutions, he performs none of these analyses. Instead, he minimizes the offense as "being armed against a violent intruder" and asserts that he "was permitted" to possess a weapon to defend himself and Nuno against the intruder.[5] A second-strike sentence of nine years for being a felon in possession of a firearm with multiple prior felony convictions involving firearms does not on its face "shock[] the conscience" or "offend[] fundamental notions of human dignity" (*Lynch*, at p. 424), nor has Delgado established that his sentence was grossly disproportionate to the offense.

VI. Alleged Prosecutorial Misconduct

Delgado argues that the prosecutor committed misconduct at several points in the trial. "'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial

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[5] When reviewing a claim of cruel and/or unusual punishment, the underlying disputed facts must be viewed in the light most favorable to the judgment. (*People v. Abundio* (2013) 221 Cal.App.4th 1211, 1217.)

fundamentally unfair is prosecutorial misconduct under state law only if it involves ""'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"" [Citation.]' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 819 (*Hill*).) To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely objection, make known the basis of the objection, and ask the trial court to admonish the jury. (*Id*. at p. 820.) Unless an objection would be futile or the prosecutor's misconduct could not be cured by an admonition, the defendant must object to the alleged misconduct at trial. (*Ibid*.)

A. Opening Statement

Defense counsel successfully objected when the prosecutor began to argue the evidence in her opening statement. "No references to burden of proof," the trial court told the prosecutor. "Just statements only about what you expect the evidence to show."

Later in the opening statement, the prosecutor said, "Also, as you heard earlier yesterday in the questions that the defense was asking—again, those questions are only questions, and anything she says—." Defense counsel objected that the prosecutor was arguing.

The court sustained the objection, but the prosecution returned to the subject of attorney questions, prompting another objection. The court instructed the prosecutor, "Please just state what you believe the evidence is going to show. You'll have a chance to argue at the end of the case."

The prosecutor said, "Yes, Your Honor," and resumed argument: "What you will hear in this case, if the defense chooses to put on witnesses, is a circumstance—." Defense counsel objected.

The trial court sustained the objection and admonished the prosecutor, "Counsel, don't refer to a defense case, please. The burden of proof is on the People."

The prosecutor began again. "The witnesses they are going to put on are going to try to say that—." Defense counsel objected again.

The court sustained the objection and advised the prosecutor, "Talk about what your evidence will show. You have an opportunity to do everything else later."

The prosecutor then said, "The witnesses they may or may not put on may or may not show evidence—."

Again the defense objected, and the court instructed the prosecutor, "Talk about your case, please."

"The evidence that may be presented by the defense—" the prosecutor said, and defense counsel objected again.

"Counsel, at this time discuss your case, please," said the trial court. The prosecutor finished her statement without further attempts to discuss the defense case.

On appeal, Delgado argues that the prosecutor committed misconduct by improperly shifting the burden of proof to the defense and by disregarding the court's rulings. Although, contrary to the court's instructions, the prosecutor repeatedly started to discuss the defense case in her opening statement, Delgado's prompt objections and the court's firm admonitions prevented the prosecutor from finishing an objectionable sentence or shifting the burden of proof.[6] Because the prosecutor's

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[6] We note that Delgado claims that the prosecutor also shifted the burden of proof in opening statement when she purportedly "mentioned the defense may call Miss Nuno as a witness." He represents that his objection that the statement

attempts at improper argument were thwarted by the court, nothing suggests that this conduct infected the trial with such unfairness as to make the conviction a denial of due process. The record does not demonstrate that, that had this event not occurred, it was reasonably probable that the outcome would have been more favorable to Delgado, who had been recorded admitting to being in possession of a firearm. (*People v. Carter* (2005) 36 Cal.4th 1215, 1264-1265; *Hill*, *supra*, 17 Cal.4th at p. 820.)

B. Gang Membership Evidence

Vallecillo testified that he recognized Delgado as the person with a gun because he had met him before. Vallecillo continued, "He called himself Yogi from the West." Defense counsel objected, the answer was stricken, and the jury was instructed to disregard the response.

Shortly thereafter, Vallecillo testified that when he was shown a photographic lineup, "Right away I saw his picture."

"Whose picture?" asked the prosecutor.

"Yogi. Jesse Delgado," Vallecillo answered. Delgado did not object.

The prosecutor asked Vallecillo to read his written statement identifying Delgado from the photographic lineup. He

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shifted the burden of proof was overruled. The record does not support either contention. The prosecutor did not say that the defense might call Nuno as a witness; she merely said that the People would not do so. Delgado objected on the ground that the statement was argumentative, not because of any purported burden shifting. Delgado's argument, contradicted by the record, is insufficient to establish misconduct.

read, "The person in number three pointed a gun at me at my son's house on 11-23-2015."

Defense counsel objected. The court clarified that Vallecillo had written the statement, and then ruled, "Thank you. That's admitted."

Although no question was pending, Vallecillo continued reading: "He told me his name was Yogi from West Side."

Defense counsel objected, the court struck the statement, and the court admonished the jurors to "disregard anything that's stricken as not admitted into evidence in this case."

Soon afterwards, outside the presence of the jury, the court prohibited all references to gangs. The court, however, permitted the name "Yogi" to be used because it was the name by which Vallecillo referred to Delgado in his 911 call after the November 23, 2015, incident. The court ruled that in the absence of a stipulation Vallecillo was referring to Delgado in the call, "The name has to come in because that's what he's identifying." Delgado does not identify any further references to "the West Side" at trial.

On appeal, Delgado argues that the prosecutor committed misconduct by eliciting "unduly prejudicial and irrelevant" gang evidence. The record does not support the contention that the prosecutor elicited evidence of gang membership; rather, Vallecillo twice volunteered that Delgado was associated with a gang by mentioning "the West Side." As for the use of the name "Yogi," the trial court ruled that the name could be used on its own, and Delgado has not challenged this evidentiary ruling on appeal. Delgado has not established any misconduct.

C. Allegedly Late Discovery

Delgado asserts that the prosecutor did not provide the defense with a supplemental police report until trial was well underway. She refers this court to a brief passage in the reporter's transcript in which defense counsel and the prosecutor disagreed about whether a report had been provided in discovery. The court instructed the prosecutor to "[g]et a copy right now," and the record indicates a pause in the proceedings. When the proceedings resumed, Delgado made no objection or claim of prosecutorial misconduct, nor did he assert that the allegedly late production of the report prejudiced him in any way. He has therefore forfeited this claim on appeal. (*Hill*, *supra*, 17 Cal.4th at p. 820.)

D. Closing Argument

In closing argument, the prosecutor argued extensively about the import of the recorded telephone call involving Delgado, Vallecillo, and Nuno. The prosecutor said, "It comes down to the defendant's own statement, his own words. And his own words are enough—his own word [*sic*] are proof beyond a reasonable doubt that he's guilty, ladies and gentlemen. His words and [Vallecillo] saying that, yeah, it happened and the defendant not denying that it happened is proof beyond a reasonable doubt."

On appeal, Delgado argues that the sentence, "And his own words are enough—his own word [*sic*] are proof beyond a reasonable doubt that he's guilty," constituted a prejudicial misstatement of the law that resulted in the denial of due process. In this sentence the prosecutor inaccurately stated the law (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1169 [defendant may not be convicted exclusively on the basis of his statements

without some independent proof of the corpus delicti]), although in the next sentence she corrected her error. Delgado did not object to the prosecutor's statement, nor did he request a jury admonition. To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely objection, make known the basis of the objection, and ask the trial court to admonish the jury. (*Hill*, *supra*, 17 Cal.4th at p. 820.)

Relying on *People v. Vance* (2010) 188 Cal.App.4th 1182, at page 1198, Delgado argues that he did not forfeit this argument by failing to object because "counsel did not want to draw further attention to the prejudicial argument." In *Vance*, however, defense counsel did object to allegedly improper argument; the question was whether defense counsel objected promptly enough to preserve the issue for appeal. (*Ibid.*) *Vance* is inapposite here because Delgado did not object at all. Delgado has forfeited this argument by failing to object at trial.

DISPOSITION

The judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

FEUER, J.